

Appendix E
Procedures Relating to Endangered Species Protection

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E.1 Assessing the Effects of Your Discharge and Discharge-Related Activities

You must follow the procedures in this appendix to assess the potential effects of applicable stormwater discharges, discharge-related activities, and allowable non-stormwater discharges on listed species and their critical habitat and determine which of the eligibility criterion (see Part E.2), if any, you qualify under. In accordance with Part 5.1.6.1 of this permit, you must keep documentation with your SWPPP to support your determination of eligibility under Part 1.1.4.5, including the process employed and results of the endangered species investigation.

If you are seeking renewal of coverage under the MSGP, you must complete this analysis using any data collected when your site was fully active and operational, even if you are now claiming that your site is inactive and no industrial materials or activities are exposed to stormwater. If no such data exist for your facility, you should utilize the best available information from any industrial facility(ies) expected to discharge substantially similar effluents, based on the similarities of the general industrial activity, control measures, and runoff coefficients of their drainage areas. You should contact EPA if you need assistance in obtaining data from a facility with a substantially similar effluent.

When evaluating the potential effects of your activities, you must consider effects to listed species or critical habitats within the “action area.” Action area is defined in Appendix B as all areas affected directly or indirectly by the stormwater discharges, allowable non-stormwater discharges, and stormwater discharge-related activities, and not merely the immediate area involved in these discharges and activities. This includes areas beyond the footprint of the facility that are likely to be affected by stormwater discharges, discharge-related activities, and allowable non-stormwater discharges. For example, normal construction, operations and maintenance activities can result in noise impacts and discharges of pollutants into downstream areas which can increase the “action area” beyond the footprint of the facility. “Facility” is defined in Appendix A.

Step One: *Determine if the Eligibility Requirements of Criterion B, C, or F Can Be Met.*

You should first determine whether you are eligible under Criteria B, C, or F because of a previously completed ESA section 7 consultation, a previously issued ESA Section 10 permit, or because your activities were already addressed in another discharger’s certification of eligibility as follows:

- i. The effects of your activities have been addressed in a consultation under ESA Section 7 on a separate Federal action (check box B corresponding to Criterion B).
- ii. The effects of your activities have been addressed through approval of a Habitat Conservation Plan under Section 10 of the ESA (check box C corresponding to Criterion C). Stormwater discharges from your industrial facility may be

authorized by this MSGP if some activity is authorized through the issuance of a permit under section 10 of the ESA and that authorization addressed the effects of your stormwater discharges on federally-listed species and designated critical habitat. You must follow U.S. Fish and Wildlife Service (FWS) and/or National Marine Fisheries Service, also known as NOAA Fisheries (NMFS) procedures when applying for an ESA Section 10 permit (see 50 CFR 17.22(b)(1) for FWS and 222.22 for NMFS). Application instructions for section 10 permits for FWS and NMFS can be obtained by accessing the FWS and NMFS websites (www.fws.gov and www.nmfs.noaa.gov) or by contacting the appropriate FWS and NMFS regional office.

- iii. You are covered under the eligibility certification of another operator for the project area (check box F corresponding to Criterion F). Your stormwater discharges, discharge-related activities, and allowable non-stormwater discharges were already addressed in another discharger's certification of eligibility under Criteria A, B, C, D, or E, which also included your facility and determined that federally listed endangered or threatened species or designated critical habitat would not be jeopardized. To certify eligibility under this criterion there must be no lapse of coverage in the other operator's certification. By certifying eligibility under Criterion F, you agree to comply with any measures or controls upon which the other discharge certification under Criterion B, C, or D was based. If your certification is based on another operator's certification under Criterion E, that certification is valid only if you have documentation showing that the other operator had certified under Criterion E, and you provide EPA with the relevant supporting information in your NOI form. Certification under Criterion F is discussed in more detail in the Fact Sheet that accompanies this permit.

Step Two: *Determine if Listed Threatened or Endangered Species and Critical Habitat are Present in the Action Area.*

Next, you should first determine whether federally-listed species are likely to occur in your action area. If you determine that there is a federally-listed species likely to occur in your action area, follow Step 3. If you determine that there are no federally-listed species likely to occur in your action area, you can certify that the facility meets Criteria A (check box A corresponding to Criteria A).

You can do this by obtaining a list of threatened and endangered species that are likely to occur in your general area, including the appropriate receiving water for your discharges. County-specific or sometimes township-specific lists of Federally threatened and endangered species are available from the local offices of FWS, and NMFS, or on their internet sites. The types of species that are likely to be present determine which Service office you should contact (in general, NMFS has jurisdiction over marine, estuarine, and anadromous species). Visit www.epa.gov/npdes/stormwater/cgp to find the appropriate site for your state or check with your local Service office. If there are listed species in your county or township, you must then determine, as best you are able, whether any of the species are likely to occur in your action area.

(use the Services or State and Tribal Heritage Centers, as necessary). General species information can be found at www.fws.gov/endangered/wildlife/html.

You must also check to see if critical habitat has been designated and whether such areas overlap your action area. Critical habitat should be listed on the species list for your county or township available from the appropriate Service office. You can also find critical habitat designations at 50 CFR Parts 17 and 226 www.access.gpo.gov and at www.fws.gov/endangered/wildlife/html.

If there are no listed species and no critical habitat areas that overlap your action area, or if your local FWS or NMFS indicates that listed species are not likely to occur in your action area, you have satisfied your eligibility obligations under Criterion A (check box A on the Notice of Intent Form). If there are listed species and if you determine or your local FWS, NMFS, or State or Tribal Heritage Center indicates that these species could occur in the action area, you will need to evaluate whether your action area supports habitat(s) that are suitable for listed species or the constituent elements of critical habitat. Your evaluation may utilize one or more of the following approaches:

Gather information about the species and critical habitat that are likely to occur in your action area (www.fws.gov/endangered/wildlife.html). Conduct a visual inspection of the action area to assess the potential presence of listed species and their habitats. Compare the size and types of habitats available in your action area and adjacent areas with the size and types of habitats used by listed species and constituent elements of critical habitat. This method may be particularly suitable for facilities where the action area is smaller in size or located in non-natural settings such as highly urbanized areas or industrial parks where there is little or no natural habitat, or for facilities that discharge directly into municipal separate storm sewer systems.

Conduct a formal biological survey (typically performed by environmental consulting firms). In some cases, biological surveys may be an appropriate way to assess whether species are likely to be located in the action area and whether there could be adverse effects to such species. A biological survey may in some cases be useful in conjunction with Steps Two, Three or Four of these instructions. However, biological surveys can often be inconclusive and some survey methods may require a special State or Federal permit. You should coordinate with the appropriate Service office before conducting biological surveys for threatened and endangered species.

Reference an environmental assessment completed for the site under the National Environmental Policy Act (NEPA). Such assessments may indicate whether listed species and critical habitats are likely to occur in the action area. Coverage under this MSGP may trigger a requirement for such an assessment for new sources (that is, dischargers subject to New Source Performance Standards under section 306 of the Clean Water Act). Other facilities might require an assessment under NEPA for other reasons, such as federal funding or other federal involvement in the facility. If the action area likely supports listed threatened or endangered species or critical habitat, you must evaluate the potential for impacts to species and/or habitat when following Steps Three through Five. Note that many but not all measures implemented to protect listed species under these steps will also protect critical habitat. Thus, meeting the

eligibility requirements of this MSGP may require measures to protect critical habitat that are separate from those to protect listed species.

Step Three: *Determine if your Activities Are Not Likely to Adversely Affect Listed Threatened or Endangered Species or Designated Critical Habitat*

To receive MSGP coverage, you must analyze the effects of your activities, which may include not only your discharge, but also any construction, operation, and maintenance activities related to stormwater management. You must be able to conclude that your discharge and stormwater management related activities are not likely to adversely affect threatened or endangered species or designated critical habitat that are likely to occur in your action area. To arrive at this conclusion, you should be able to conclude that listed species and critical habitat are not likely to be exposed to the effects of your activities, or if they are exposed, they are not likely to respond to the effects, or if they do respond, the responses are not sufficient to reduce an individual's chances of surviving and reproducing or diminish the amount or suitability of constituent elements of critical habitat. Construction, operation, and maintenance of facilities related to your stormwater discharge can potentially result in the following adverse effects:

- **Hydrological.** Stormwater discharges may adversely affect receiving waters from pollutant parameters such as temperature, salinity or pH. These effects will vary with the amount of stormwater discharged and the volume and condition of the receiving water. Where a stormwater discharge constitutes a minute portion of the total volume of the receiving water, adverse hydrological effects are less likely. Industrial activity itself may also alter drainage patterns on a site where construction occurs, which can impact listed species, their habitat, and critical habitat.
- **Habitat.** Outdoor activities, such as storage of materials and land disturbances associated with stormwater management-related activities, such as the installation or placement of stormwater control measures, may adversely affect listed species, their habitat, and critical habitat. Stormwater may drain or inundate listed species habitat.
- **Toxicity.** Pollutants in stormwater may have toxic effects on listed species and adversely affect critical habitat. Exceedances of benchmarks, effluent limitation guidelines, or State or Tribal water quality requirements may be indicative of potential adverse effects on listed species or critical habitat.

The scope of effects to consider will vary with each site. If you are having difficulty determining whether your facility is likely to adversely affect listed species or critical habitat, or one of the Services has already raised concerns to you, you must contact the appropriate office of the FWS or NMFS for assistance. If adverse effects are not likely, you have satisfied your eligibility obligations under Criterion E and you may proceed to submitting your NOI for coverage under the MSGP (check box E corresponding to Criterion E). As part of certifying your compliance with Criterion E, you must submit information to support your findings. If you are an existing discharger, you are required to (1) identify any pollutant parameters for which you have ever exceeded the benchmark or effluent limitations guideline, or have ever been found to have caused or contributed to an exceedance of an applicable water quality standard, or

violated a State or Tribal water quality requirement; (2) provide a list of the federally-listed threatened or endangered species or their designated critical habitat that are likely to occur in the action area; and (3) provide your rationale supporting your determination that you qualify under Criterion E. If you are a new discharger, you must provide the list of species or critical habitat and the technical evaluation (described in (2) and (3) above, respectively), and you must also include a list of the potential pollutants in your discharge.

If you can not yet conclude your stormwater discharge is not likely to adversely affect listed species or critical habitat, or if you conclude that your stormwater discharge could potentially adversely affect listed species or critical habitat, you must follow Step Four.

Step Four: *Determine if Measures Can Be Implemented to Avoid Adverse Effects or If Further Analysis Supports the Conclusion that Adverse Effects Are Not Likely.*

If you could not make a preliminary determination in Step 3 that adverse effects to listed species and/or critical habitat are not likely to occur, you can still receive coverage under Criterion E if appropriate measures are undertaken to avoid or eliminate the likelihood of adverse effects prior to applying for MSGP coverage. These measures may be relatively simple, e.g., re-routing a stormwater discharge to bypass an area where species are located, relocating control measures, or changing the “footprint” of the industrial activity. Provided you are able to install and implement appropriate measures, you may proceed to submitting your NOI for coverage under the MSGP (check box E corresponding to Criterion E). As part of certifying your compliance with Criterion E, you must submit information to support your findings. If you are an existing discharger, you are first required to (1) identify any pollutant parameters for which you have ever exceeded a benchmark or an effluent limitations guideline, or have ever been found to have caused or contributed to an exceedance of an applicable water quality standard, or violated a State or Tribal water quality requirement; (2) provide a list of the federally-listed threatened or endangered species or their designated critical habitat that are likely to occur in the action area; and (3) provide your rationale supporting your determination that you qualify under Criterion E, including a description of measures you will implement to avoid or eliminate the likelihood of adverse effects. If you are a new discharger, you must provide the list of species or critical habitat and the technical evaluation (described in (2) and (3) above, respectively), and you must also include a list of the potential pollutants in your discharge.

If you cannot ascertain which measures to implement to avoid the likelihood of adverse effects, you must follow Step Five.

Step Five: *Determine if the Eligibility Requirements of Criteria D Can Be Met.*

Where adverse effects are likely and you are unable to avoid or eliminate the likelihood of adverse effects, you must contact the FWS and/or NMFS. However, you may still be eligible for MSGP coverage if any likely adverse effects can be addressed through meeting Criteria D as follows:

You have coordinated your activities with the appropriate Service office (see Criterion D). In the absence of any other conditions set forth in Step Four, you may still be able to

qualify for coverage under this MSGP if you coordinate with the FWS or NMFS and the Service provides a letter or memorandum concluding that permitting your stormwater discharges under the MSGP is consistent with the “not likely to adversely affect” determination for the MSGP. If you adopt measures to avoid or eliminate adverse effects, per the Service’s requirements or recommendations, you must abide by those measures for the duration of your coverage under the MSGP. Any such measures must be described in the Stormwater Pollution Prevention Plan and are enforceable MSGP conditions and/or conditions for meeting the eligibility criteria in Part 1.1.4.5.

You must comply with any terms and conditions imposed under the eligibility requirements to ensure that your stormwater discharges, discharge-related activities, and allowable non-stormwater discharges are protective of listed species and/or critical habitat. See Part 2.3 of the permit. If the eligibility requirements cannot be met, and maintained, then you are not eligible for coverage under this MSGP. In these instances, you may consider applying to EPA for an individual permit.

E.2 Eligibility Criterion

As required by Part 1.1.4.5, you must meet one or more of the following six criteria (A-F) to be eligible for coverage under the permit for your stormwater discharge, discharge-related activities, and allowable non-stormwater discharges:

- Criterion A. No federally-listed threatened or endangered species or their designated critical habitat are likely to occur in the “action area”; or
- Criterion B. Consultation between a Federal agency and the U.S. Fish and Wildlife Service and/or the National Marine Fisheries Service (together, the “Services”) under section 7 of the ESA has been concluded. Consultations can be either formal or informal, and would have occurred only as a result of a separate federal action (e.g., during application for an individual wastewater discharge permit or the issuance of a wetlands dredge and fill permit).

The consultation must have addressed the effects of your facility’s stormwater discharges, allowable non-stormwater discharges, and stormwater discharge-related activities on federally-listed threatened or endangered species and federally-designated critical habitat, and must have resulted in either:

- i. a biological opinion finding no jeopardy to federally-listed species or destruction/adverse modification of federally-designated critical habitat; or
- ii. written concurrence from the Service(s) with a finding that the facility’s stormwater discharges associated with industrial activity, discharge-related activities and allowable non-stormwater discharges are not likely to adversely affect federally-listed species or federally-designated critical habitat; or

- Criterion C. Your industrial activities are authorized through the issuance of a permit under section 10 of the ESA, and authorization addresses the effects of the stormwater discharges associated with industrial activity, discharge-related activities, and allowable non-stormwater discharges on federally-listed species and federally-designated critical habitat; or
- Criterion D. Coordination between you and the U.S. Fish and Wildlife Service and/or the National Marine Fisheries Service has been concluded. The coordination must have addressed the effects of the facility's stormwater discharges associated with industrial activity, discharge-related activities, and allowable non-stormwater discharges on federally-listed threatened or endangered species and federally-designated critical habitat. The result of the coordination must be a written statement from the Service concluding that authorizing your stormwater discharges, discharge-related activities, and allowable non-stormwater discharges is consistent with the determination that the issuance of the MSGP is not likely to adversely affect federally-listed threatened or endangered species and federally-designated critical habitat. Any conditions or prerequisites deemed necessary to achieve consistency with the "not likely to adversely effect" determination become eligibility conditions for MSGP coverage, and permit requirements under Part 2.3; or
- Criterion E. Authorizing your stormwater discharges associated with industrial activity, discharge-related activities, and allowable non-stormwater discharges is consistent with the determination that the issuance of the MSGP is not likely to adversely affect any federally-listed endangered and threatened ("listed") species or designated critical habitat ("critical habitat"). To support your determination that you meet Criterion E, you must provide supporting documentation for your determination.
- i. If you are an existing discharger, you must provide the following information with your completed Notice of Intent (NOI) form: (1) a list of the federally-listed threatened or endangered species or their designated critical habitat that are likely to occur in the "action area"; (2) a list of the pollutant parameters for which you have ever exceeded the benchmark or applicable effluent limitations guideline, or for which you have ever been found to have caused or contributed to an exceedance of an applicable water quality standard or to have violated a State or Tribal water quality requirement (Part 9); and (3) your rationale supporting your determination that you meet Criterion E, including appropriate measures to be undertaken to avoid or eliminate the likelihood of adverse effects.
 - ii. If you are a new discharger, you must provide the following information with your completed NOI form: (1) a list of the federally-listed threatened or endangered species or their designated critical habitat that are likely to occur in the "action area"; (2) a list of the potential pollutants in your discharge; and (3) your rationale supporting your determination that you meet Criterion E, including

appropriate measures to be undertaken to avoid or eliminate the likelihood of adverse effects; or

- Criterion F. The facility's stormwater discharges associated with industrial activity, discharge-related activities, and allowable non-stormwater discharges were already addressed in another operator's valid certification of eligibility that included the industrial activities and there is no reason to believe that federally-listed species or federally-designated critical habitat not considered in the prior certification may be present or located in the "action area". To certify eligibility under this criterion there must be no lapse of coverage in the other operator's certification. By certifying eligibility under this criterion, you agree to comply with any measures or controls upon which the other operator's certification was based. You must comply with any applicable terms, conditions, or other requirements developed in the process of meeting the eligibility requirements of the criteria in this section to remain eligible for coverage under this permit. Documentation must be kept with your SWPPP. If your certification is based on another operator's certification under Criterion E, that certification is valid only if you have documentation showing that the other operator had certified under Criterion E, and you provide EPA with the relevant supporting information required of existing dischargers in Criterion E (above, under subparagraph (i)) in your NOI form.